No. 95-806

(5)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, IN HIS OFFICIAL CAPACITY AS MAYOR OF BALTIMORE CITY; DAVID TANNER, IN HIS OFFICIAL CAPACITY AS THE GENERAL SUPERINTENDENT OF ZONING ADMINISTRATION AND ENFORCEMENT OF BALTIMORE CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
GARY A. ORSECK
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

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In opposing the grant of certiorari, the City does not take issue with *any* of the principal points made in the petition. It thus does not deny that, under the Fourth Circuit's approach, a court applying intermediate First Amendment scrutiny may ask only whether the legislature *reasonably could have believed* that restrictions on speech were warranted — a holding that plainly is inconsistent with this Court's decisions. The City similarly does not contend that there is *any* evidence suggesting that the peculiar and gerrymandered restrictions in Baltimore's ordinance *will in fact* have a *direct and material* impact on underage smoking — a finding that, under this Court's holdings, is essential to uphold a limit on speech. The City does not deny that, as we noted in the petition, the Fourth Circuit's preemption analysis permits states and localities to completely ban cigarette advertising. And the City nowhere disputes the great practical importance of the issues presented here; the City does not, and could not, deny that restrictions like those in the ordinance are being considered or implemented by other municipalities around the country. In these circumstances, further review of the important and recurring issues presented here is warranted.

A. Review Of The First Amendment Issue Is Warranted

1. We explained in the petition that, when exercising intermediate First Amendment scrutiny of a restriction on speech, this Court has held that courts must engage in an "'independent judgment of the facts'" said to support the restriction. *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion) (citation omitted). We also demonstrated that the court of appeals, in sharp contrast, believed that courts exercising intermediate scrutiny may assess only "'the reasonableness of the legislature's belief'" that it acted rationally in restricting speech. Pet. App. 11a (citation omitted). This is a very significant difference in approach — one that could be outcome-dispositive in this and many other cases. The City's brief in opposition makes *no response at all* to this point, which establishes beyond peradventure that the choice of standard of

review in commercial speech cases is important enough to warrant consideration by this Court.

Indeed, the City's only comment at all on the standard of review applied by the court of appeals is its assertion (at Br. in Opp. 5-6) that other courts are unlikely to follow the Fourth Circuit's error. But the clarity of the court of appeals' decision — as well as the full Fourth Circuit's refusal to rehear the case in banc — makes plain that the holding below was not an aberration in that Circuit. Moreover, as explained in the petition (at 13-14), review by this Court is essential to ensure that lower courts are not led astray by arguably confusing language in *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The court of appeals understood those decisions to stand for the proposition that a restriction on commercial speech will be upheld whenever there is a logical connection between the legislative means and ends. See Pet. 14. We explained in the petition, however (at Pet. 14), that neither *Edge* nor *Posadas* stands for such a principle, and any such rule could not in any event be reconciled with the Court's most recent decisions. Again, the City makes *no response at all* to these points.[1]

2. We explained in the petition (at 14-15) that, under the third prong of the *Central Hudson* test, a governmental body seeking to limit commercial speech must demonstrate that "'its restriction *will in fact* alleviate [the harms targeted

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[1] The City does observe (at Br. in Opp. 9 n.3) that *Posadas* was cited in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995). But *Posadas* was cited there for its holding regarding the substantial nature of the government's interest in discouraging gambling, not for the unrelated proposition — endorsed by the court of appeals and the City here — that courts may disregard evidence establishing the inefficacy of a challenged restriction on speech.

by the government] to a material degree'" (*Coors*, 115 S. Ct. at 1592 (citation omitted) (emphasis added)); the Fourth Circuit, in contrast, held that "'it is *not* necessary * * * to prove conclusively that the correlation in fact exists.'" Pet. App. 11a (citation omitted) (emphasis added). The City's attempt to explain away this inconsistency entirely misses our point. The City notes (Br. in Opp. 7-8) the court of appeals' recognition that the *City Council* pointed to evidence in the *legislative record* suggesting that advertising stimulates smoking by minors. But the City pointedly does not assert that the court of appeals either itself reviewed the evidence before the trial court or found that the ordinance "will in fact" reduce underage smoking.

In addition, as we also explained in the petition (at 15-17), whether or not there necessarily is a general relationship between advertising and demand — a point that was hotly disputed and was not resolved by either court below — there is absolutely *no* evidence that *Baltimore's* ordinance will reduce smoking by minors at all. The gerrymandered advertising ban worked by the ordinance permits literally thousands of cigarette advertisements to remain throughout the City in locations sure to be seen by minors. For that matter, while the ordinance punishes billboard owners, there is no reason to believe that the ordinance will achieve *any* net reduction in the number of tobacco advertisements on outdoor signs of one kind or another to which minors are exposed. See Pet. 17. In these circumstances, the court of appeals' approach would read the third prong out of the *Central Hudson* test. Again, the City makes *no response at all* to this point.

3. The City's argument under the fourth prong of *Central Hudson* is similarly nonresponsive. We explained in the petition (at 19-20) that the ordinance is fatally underinclusive under *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), because there is no meaningful difference between the advertisements that are barred and the

innumerable other outdoor signs that are unaffected. In response, the City relies (Br. in Opp. 9-10) upon *Packer Corp.* v. *Utah*, 285 U.S. 105 (1932), where the Court held that a state may rationally distinguish between billboard and newspaper advertisements. In fact, *Packer* — which was decided long before commercial speech first received constitutional protection — did not involve a First Amendment claim at all. But our point, in any event, is that the Baltimore ordinance improperly discriminates *within* the category of outdoor advertising, barring billboards while allowing other indistinguishable outdoor signs at sports arenas and retail stores, and on taxicabs and buses.[2] As we noted in the petition (at 18 & n.13, 19) — and as the *amicus* brief of the Outdoor Advertising Association confirms — this patent underinclusiveness of the ordinance raises the inference that the City is restricting speech "in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1800 (1993). Again, the City makes *no response at all* to this point.

4. The City sets out a red herring when it suggests (at Br. in Opp. 10-12) that the Court should defer review of the issue presented here because the Food and Drug Administration has proposed a rule that would restrict

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[2] While the point is obscured by strategically placed ellipses in the City's recital of the statute at issue in *Packer* (at Br. in Opp. 10-11), that Utah law expressly *barred* kinds of outdoor (and, for that matter, indoor) tobacco advertisements that are expressly *permitted* by exceptions to the Baltimore ordinance. The Utah statute thus precluded tobacco advertisements "'on any bill board, street car sign, street car, placard, or on any other object or place of display.'" 285 U.S. at 107 (citation omitted). The only exception was for a dealer in cigarettes, who was permitted to "'have a sign on the front of his place of business stating that he is a dealer in such articles.'" *Ibid.*

cigarette advertising. The FDA proposal would not moot the issues in this case even if it were validly implemented *in toto*.[3] In any event, there is no way to know what the rule will look like when it is in final form, or whether or when it will be promulgated — and if it is put in place the rule surely will be subject to innumerable challenges on grounds unrelated to the First Amendment. In the meanwhile, the decision below will stand as an important precedent that provides guidance (legally erroneous, we submit) to municipalities across the nation as they seek to limit the advertising of tobacco, alcohol, and other disfavored products. Review of this case therefore is imperative.

B. The Preemption Question Warrants Review

We explained in the petition that the court of appeals' decision regarding preemption threatens to undermine a carefully crafted legislative compromise, providing a roadmap for states and municipalities that seek to evade the requirements of the Federal Cigarette Labeling and Advertising Act. The City's arguments against review of the Fourth Circuit's preemption holding are insubstantial.

1. The City's principal contention (at Br. in Opp. 12-13) is that state and local governments may ban cigarette advertising outright, so long as they do not "alter the content

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[3] While the FDA's proposed rule would prohibit outdoor tobacco advertising within 1000 feet of schools and playgrounds, it would require all remaining outdoor tobacco advertising to comply with otherwise valid state or local requirements. 60 Fed. Reg. 41314, 41374, 41375-41451. Those requirements, of course, would be subject to the very sort of First Amendment scrutiny sought here but denied below. In addition, because the FDA does not and could not itself purport to negate the limits on state and local power imposed by the Federal Cigarette Labeling and Advertising Act, the Act's preemption provision would remain highly pertinent even if the FDA's rule were validly adopted as proposed.

or regulate the message of cigarette commercials." This contention is simply incorrect. As the Court noted in *Cipollone*, Congress substantially broadened the Act in 1969 so as to preempt, not just the regulation of health-related "*statements* * * * in the advertising of cigarettes" (15 U.S.C. § 1334(b) (1965) (emphasis added)), but any "requirement *or prohibition* based on smoking and health * * * with respect to the advertising or promotion" of cigarettes. *Ibid.* (as amended in 1969) (emphasis added). See S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969) (emphasis added) (the Act "[p]rohibits health-related *regulation or prohibition* of cigarette advertising"). And there is no doubt that the ordinance, which prohibits the advertising of cigarettes on billboards, is the very model of a "prohibition * * * with respect to the advertising" of cigarettes.[4]

2. The City also makes the rather implausible assertion that the ordinance is not "based on smoking and health" because in promulgating the advertising ban the City Council was motivated exclusively, not by any concern for the health of minors, but instead by its interest in aiding the enforcement of a state law that bars the sale of tobacco to underage purchasers. Br. in Opp. 13-14; see *id.* at 1-4. The short answer to this argument is that it was not the basis for the holding below; while recognizing the public health interests served by the ordinance,[5] the court of appeals

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[4] Because the ordinance is an express regulation of the content of advertising — it determines whether an advertisement is permissible by reference to its content — the City's contention (Br. in Opp. 12) that "the decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising" is a *non sequitur*, as well as a misinterpretation of the nature of the statutory preemption.

[5] See Pet. App. 10a (noting that "the City's objective in reducing cigarette consumption by minors constitutes a substantial

rejected the preemption challenge because it believed that the Act does not preempt restrictions that limit "only the *location* of signs that advertise cigarettes." Pet. App. 9a (emphasis in original). That the court of appeals did not endorse the City's current position is hardly surprising: although the City now unaccountably denies it (see Br. in Opp. 1), the City's counsel expressly conceded at oral argument before the Fourth Circuit that the ordinance was enacted out of "concern[] with the health of children." Ct. App. Tr. 23.[6] Having prevailed before the court of appeals by offering one account of the ordinance's purpose, the City cannot now defeat review in this Court by changing its tune.

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public interest" given "the context of current public concern over the dangers of cigarette consumption by minors").

[6] The City asserts (Br. in Opp. 1) that it is "constrained to address Petitioner's misstatement[]" that it conceded that the ordinance was in fact based on health concerns. But the City never explains how we misstated its position, which it expressed at oral argument as follows:

> Judge Butzner: Well, a judge saying [the ordinance] doesn't relate to smoking and health is pretty far fetched, isn't it? * * * .
>
> Mr. Levin: I don't want to stand here and say the city council is not concerned with the health of children. Obviously it is. But I also want to say that it is not impermissible for the city council to be concerned with the health of children * * * .
>
> Judge Butzner: That is why they are doing it.
>
> Mr. Levin: Well, they are, but, I mean, the state law is that that designed to protect the health of minors is insulated from attack * * * .

Ct. App. Tr. 23.

3. Moreover, entirely apart from the court of appeals' rationale, the ordinance cannot be saved on the theory that "Baltimore's law is not 'based on smoking and health' but rather on a more general obligation — 'the duty not to advertise products which are illegal for sale to minors * * *.'" Br. in Opp. 14 (citation omitted). The ordinance is not a general ban on the advertisement of products that cannot lawfully be sold to minors; it is specifically directed at cigarette advertising, is concededly based on the perceived connection between smoking and health, and is defended as effectuating a state law that itself was premised on health concerns.[7] If accepted, the City's argument would provide states and localities with a subterfuge that could be used to justify any restriction on cigarette advertising, an outcome that would render the Act nugatory. Cf. *Perez* v. *Campbell*, 402 U.S. 637 (1971).

4. The City attempts to distinguish *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), on the ground that the restriction at issue in that case affected the content of cigarette advertisements. Br. in Opp. 15. But the City simply ignores the actual holding of *Vango Media*, which it nowhere quotes or cites. The Second Circuit invalidated the counter-advertising requirement at issue in *Vango Media* — even though, under New York City's restriction, "the actual cigarette advertisements would not look different" (34 F.3d at 74) — because the court understood the Act to preempt *any* state or local requirement that "treads on the

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[7] As we explain in the petition (at 23 n.15), the Maryland statute that precludes the sale of cigarettes to minors — and whose enforcement the ordinance purportedly assists — is *itself* related to smoking and health. If the ordinance were intended to encourage compliance with that law, it surely would have to be understood to share the law's purpose. The City makes no response at all to this point.

area of tobacco advertising." *Ibid.* The Second Circuit went on to explain that

> advertisers and promoters like Vango would be substantially impacted by the Local Law's requirements. Perhaps were § 1334(b)'s 1965 provisions still in effect, we might be persuaded by the proposition advanced by the City that Congress only meant to preempt state and local laws that change the actual look of cigarette advertisements. But, the more expansive reach of § 1334(b), as clearly evidenced by its amended language, precludes that result.

Ibid. There is no doubt that Baltimore's ordinance would be invalid under this holding.

* * * *

We noted in the petition (at 27-28) that the First Amendment issue presented here is similar to the one currently before the Court in *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140; we therefore suggested that the Court either grant the petition or consider holding it pending disposition of *44 Liquormart*. The City acknowledges that *44 Liquormart* "is tangentially related" to this case (Br. in Opp. 5 n.2) but asserts conclusorily that "the decision in that case is not likely to shed new light on the law." *Ibid.* We take this unilluminating declaration to be a tacit concession that the Court should hold this case for *44 Liquormart* if it chooses not to grant review at this time.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
GARY A. ORSECK
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

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* *Counsel of Record*